SUPREME COURT, U. S.

JAN 2 1970

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Number 513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter

of

DAN A. SPENCER

On Appeal from the First Judicial
District Court, Caddo Parish, Louisiana

BRIEF ON BEHALF OF RESPONDENT TRIAL JUDGE IN SUPPORT OF MOTION TO DISMISS OR ALTERNATIVELY AFFIRM

JACK P. F. GREMILLION
Attorney General of the
State of Louisiana,

Attorney for the Honorable
R. B. Williams, Judge,
Respondent

MID-SOUTH PRESS, INC. SHREVEPORT, LOUISIANA

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290 Federal Supplement and will not be here repeated.[31]

In re Sawyer[32] concerned disciplinary proceedings against an attorney for out-of-court utterances. A concurring opinion by Justice Stewart correctly states the law as it existed then, as it historically has existed, and, we submit, as it exists now, concerning the duty of an attorney *vis a vis* free speech.[33]

> "* * * A lawyer belongs to a profession with inherent standards of propriety and honor which experience has

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31. See *Ex parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405; *In re Sawyer*, 360 U. S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473; *Fisher v. Pace*, 336 U. S. 155, 69 S. Ct. 425, 93 L. Ed. 569; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 31 S. Ct. 492; *Cooke v. United States*, 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390; *In re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682; *Offutt v. United States*, 348 U. S. 11, 75 S. Ct. 11, 99 L. Ed. 11; *Bloom v. State of Illinois*, 391 U. S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522; *Lanoix v. Home Indemnity Co. of New York*, 204 La. 1044, 16 So. 2d 834 (La. S. Ct. 1943); *In re Portland Electric Power Co.*, 97 F. Supp. 903 (U. S. D. Ct., Oregon, 1947); *Spencer v. Dixon*, 181 So. 2d 41, 248 La. 604 (La. S. Ct., 1965); *Fleming v. United States*, 279, F. 613 (C. C. A. 9th, 1922). Note the similarity of facts and issues in *Fleming* with the instant matter. These cases represent the controlling United States Supreme Court cases and a fair sampling of other federal and Louisiana cases developing contempt authority to its present state as concerns due process and free speech.

Additional lower federal court decisions concerning the relationship between due process and contempt include: *United States v. Seidmon*, 154 F. 2d 228 (C. C. A. 7th, 1946); *Shemaitis v. Reid*, 193 F. 2d 119 (C. C. A. 7th, 1951); *Howard v. United States*, 182 F. 2d 908 (C. C. A. 8th, 1950); *United States v. Moore*, 287 F. 879 U. S. D. Ct., E. D., New York, 1923); *Simon v. United States*, 62 F. 2d 13 (C. C. A. 9th, 1932); *Craig v. Baird*, 109 F. Supp. 496 U. S. D. Ct., E. D., Michigan S. D., 1952); *Camarota v. United States*, 111 F. 2d 243 (C. C. A. 3rd, 1940); *Clark v. United States*, 61 F. 2d 695 (C. C. A. 8th, 1932); *United States v. Schiffer*, 351 F. 2d 91 (C. C. A. 6th, 1965). For the sake of brevity, most of these cases will not be separately discussed in this brief.

32. 360 U. S. 622, 3 L. Ed. 2d 1473, 79 S. Ct. 1376.

33. 3 L. Ed. 2d 1489.

shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to these standards.

"Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."

In *Fisher v. Pace*[34] this court, in 1949, reviewed the contempt citation of a Texas attorney resulting from remarks made by that attorney directed to a trial judge. In response to the constitutional issues raised (including implicitly free speech), this court stated[35] through Justice Reed:

"Historically and rationally, the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary convictions and punishment accord due process of law.

* * *

"We see nothing in their opinion or conclusion that indicates any disregard of petitioner's right * * *. We cannot say, however, that mildly provocative language from the bench puts a constitutional protection around an attorney so as to allow him to show the contempt for judge and court manifested by this record, particularly in the last few sentences of the altercation."

The orderly administration of justice is the first bastion of a society dedicated to order through justice. If the judicial arm of that society cannot command order and decorum by its officers (attorneys) then this bastion is penetrated. Obviously the republic will not fall because of any decision in this case.

34. 336 U. S. 155, 69 S. Ct. 425, 93 L. Ed. 569.
35. pp. 573 & 574, 93 L. Ed.

Equally obviously, the judiciary will assume a new proportion if the practitioners of the noble profession of law may with impunity engage in the conduct sought to be licensed by appellant.

B. Constitutionality as Applied to Appellant

Mr. Spencer seeks to escape the inexorable effect of the authorities cited previously by arguing that the pleading filed contained allegations essential for the purpose sought—the recusation of the trial judge. He seeks to be protected also because he says he does not allege his belief of the abusive language, but rather quotes others; from this shield of quotation he says the attorney's immunity must follow.[36]

In support of this excuse for his license to defame, he relies on this Court's opinion in *Holt v. Virginia*.[37] In *Holt*, an attorney filed a motion for change of venue on the basis of alleged bias of the trial judge. This Court stated that the allegations of the pleading were "no way offensive in themselves, but wholly appropriate to charge bias in the community and bias of the presiding judge." Contrast this with the charge leveled by Mr. Spencer at the trial judge herein of "corruption, favoritism, oppression and misfeasance in office." Louisiana as contrasted with Virginia requires that criticism of a trial judge to be contumacious must be irrelevant. Louisiana as contrasted with Virginia provides detailed machinery for

36. Even Mr. Spencer withdraws this transparent shield at will. In his response to the rule, he affirmed his own belief in the truthfulness of the charge. Trial Court Record, page 25. In an attempted pleading (stricken because of its scurrilous content) before the United States District Court in the collateral part of this proceeding, he withdrew this shield. 290 F. Supp. at page 534.

37. 381 U. S. 131, 14 L. Ed. 2d 290, 85 S. Ct. 1375.

recusation of judges or change of venue.[38]

This Court properly held that a litigant has a constitutional right to a fair trial before an impartial tribunal; that corollary to this right is the right to file motions raising the necessary issues for this protection.

It is not the charge of bias that prompted this contempt citation. Indeed, if the facts had justified it, direct contempt could not lie had Mr. Spencer simply alleged: (a) Mr. Spencer's clients were attempting to remove Judge Dixon from office; (b) Judge Dixon was aware of this circumstance; (c) being apprised of the fact, Judge Dixon should be recused. These allegations, if true, would obviously be protected by free speech or indeed by a higher protection, the duty of an attorney to vigorously represent his client. It must be recalled that on March 20 of 1968, Mr. Spencer did not consider the existence of any grounds for recusation. Only after he received a decision with which he disagreed did he become aggrieved. His motion for recusation was filed on March 21, 1968. His motion for recusation nowhere claims that Judge Dixon was aware of any movement by Mr. Spencer's clients to remove him from office, if indeed this fact ever existed.[39]

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38. Louisiana Code of Civil Procedure, Articles 122 and 151-161.

39. Section 5, Article 9, of the Constitution of the State of Louisiana at that time provided that on petition of 25 taxpayers alleging misfeasance or corruption in office, the Attorney General must institute proceedings before the Supreme Court of Louisiana for removal of the judge against whom the complaint is made. Neither this proceeding nor the collateral federal court proceeding indicates the existence of any such petition. During the pendency of the federal court proceedings, with the inevitable unfavorable publicity flowing therefrom, Judge Dixon was elected by the voters of his district to the Second Circuit Court of Appeal, an intermediate Louisiana appellate tribunal, hardly an event consistent with the pendency of proceedings for his removal for corruption, favoritism and misfeasance.

The inclusion in the motion to recuse of the inflammatory offensive language "corruption, misfeasance and favoritism" added not one scintilla to the motion. Its inclusion was obviously a deliberate attempt to embarrass a trial judge against whom the counsel holds animosity.[40]

Mr. Spencer seeks to have this Court reverse the holding of the Louisiana Supreme Court in *Spencer v. Dixon*,[41] an unrelated proceeding in which Mr. Spencer accused the Louisiana Supreme Court of dishonesty. A facet of this argument deserves comment. In that proceeding, as reported, Mr. Spencer sought to recuse the Louisiana Supreme Court after he accused it of dishonesty. In this proceeding Mr. Spencer sought to recuse Judge Dixon by accusing him of corruption, misfeasance, etc. *Query*: can counsel effectively choose the judge to hear his case by the ingenious machinery of accusing the judge of dishonesty or worse? Obviously not. The orderly administration of justice requires that multiple-judge trial courts assign their cases impartially.

In Mr. Spencer's difficulty with the Louisiana Supreme Court, reported in *Spencer v. Dixon, supra*, he sought, as he now seeks, to claim violation of his due process rights grounded on the refusal to allow him to prove his allegation of dishonesty of the judiciary. *This issue is not presently before this Court.* At no time in these proceedings did Mr. Spencer offer any evidence to prove the truth of his allegation. At no time was he denied the right to present such evidence.[42]

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40. See excerpt from stricken pleading of counsel quoted on page 534 of 290 F. Supp. See Article 4 of Mr. Spencer's "Response to Rule," District Court Record, page 25.
41. 181 So. 2d 41, 248 La. 604 (1965).
42. Trial Court Record, page 42.

As contrasted with *Holt*, Mr. Spencer's inflammatory allegations simply were not necessary or even pertinent to his allegation of bias. As contrasted with *Holt*, Mr. Spencer's language was offensive in and of itself.

Another facet of this motion to recuse deserves comment. Article 3 of this motion claims that the trial judge ruled against Mr. Spencer despite "overwhelming evidence" entitling Mr. Spencer's client to the relief sought. This simply is not the case.[43]

This case (*Hopkins v. Hopkins*) is for separation from bed and board. This relief is statutory, provided by Louisiana Revised Civil Code Articles 138 (5) and 143. Two elements must coincide before a plaintiff is entitled to a separation grounded on abandonment, these elements being: (a) that the offending spouse has withdrawn from the common dwelling without a lawful cause, and (b) has consistently refused to return.[44] The testimony of Mr. Hopkins (Mr. Spencer's client) was that he and his wife separated by agreement. As properly interpreted by the appellate courts of Louisiana, a separation by agreement is not an abandonment.[45] It is true that Mr. Hopkins proved the second element of abandonment, the refusal to return. It is *not* true that he proved the initial abandonment.

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43. Although on the record filed by Mr. Spencer this Court would have no way of knowing. The transcript of the separation proceeding was not filed by him.

44. Louisiana Revised Civil Code, Article 143.

45. *Jardes v. Jardes*, 191 So. 2d 645 (La. 2nd Cir. Ct. of Appeal, 1966); *Sciortino v. Sciortino*, 188 So. 2d 224 (La. 4th Cir. Ct. of Appeal, 1966).

Louisiana, as other states, provides adequate remedy for any aggrieved litigant through appeal.[46] It is an interesting commentary that Mr. Spencer did not appeal, yet felt so thoroughly aggrieved by the trial judge's ruling that he characterized it as being "* * * despite overwhelming evidence of the abandonment * * * ."[47]

These circumstances are recited that this Court might place in proper context the action of Mr. Spencer in irrelevantly defaming a member of the judiciary. Within this context it ill behooves Mr. Spencer to seek redress from this Court claiming deprivation of substantial constitutional rights. Within this context we submit Judge Williams was completely correct in characterizing this criticism as irrelevant to the pleading filed.

C. Acquiescence

The statement of the case recited the collateral federal court proceeding by Mr. Spencer. Every substantial argument here propounded by him was painstakingly considered by that court and is completely answered in the opinion of that court reported in 209 Federal Supplement 351. A careful reading of that opinion will reveal that appellant urged nothing here which was not adjudicated there. The state court proceedings were stayed during that litigation. An appeal was taken to the Circuit

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46. In this instance, an absolute right of appeal lay with the Second Circuit Court of Appeal. Article 7, Section 29, Constitution of the State of Louisiana.

47. The minutes of *Hopkins v. Hopkins* (which are filed by appellee in the copy of the district court record) reveal that Mr. Spencer at no time took advantage of the protection afforded all litigants when they feel aggrieved, the right of appeal. Trial Court Record, pages 1 and 2. Rather he chose to attempt to recuse the trial judge in hopes that another trial judge might view the law differently.

Court of Appeals, 5th Circuit. Mr. Spencer voluntarily dismissed that appeal. The administration of justice in this country, considering the proliferation of constitutional and other federal litigation, has required that this Honorable Court be carefully selective in the cases it accepts, and that these cases be limited to those (under this type of jurisdiction) presenting substantial constitutional questions. When a litigant by choice enjoins a state court proceeding, is afforded a hearing in a lower federal court and voluntarily dismisses an appeal from an adverse decision, the action of the litigant cries loudly to the insubstantiality of the purported constitutional issue. For this reason alone this Court would be wholly justified in dismissing this appeal.

Respectfully submitted,

Signed: JACK P. F. GREMILLION

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CERTIFICATE OF SERVICE

I, Jack P. F. Gremillion, a member of the Bar of the Supreme Court of the United States, attorney for the Honorable Richard B. Williams, respondent, certify that copies of the foregoing brief have been served on Mr. Dan A. Spencer, appellant, by mail addressed to him at Post Office Box 4215, Centenary Station, Shreveport, Louisiana 71104, postage prepaid, this _____ day of December, 1969.

Signed: JACK P. F. GREMILLION

Jack P. F. Gremillion
Of Counsel